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No.

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF INDIANA,
Petitioner,

vs.

JOHN H. MOORE, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTION PRESENTED

Whether the explanation to an in-custody defendant, who has been advised of his rights and has invoked his right to counsel, that the police cannot question him further and that if he desires to discuss the case further he will have to contact the police constitutes "interrogation" and would be proscribed by the Court's holding in *Edwards v. Arizona*.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioner, State of Indiana, respectfully requests the Court to issue a Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, review the decision entered by that court in cause number 1182 S 433 on September 5, 1984.

OPINION BELOW

The opinion of the Indiana Supreme Court was rendered on September 5, 1984, and is officially reported at 467 N.E.2d 710. The opinion is set forth in Petitioner's

Appendix A. Petitioner filed a timely petition for rehearing on September 19, 1984, which petition was denied on October 22, 1984. A copy of the denial of the petition for rehearing is contained in Petitioner's Appendix B.

STATEMENT OF JURISDICTION

The State of Indiana petitions for a Writ of Certiorari from a decision, in a criminal case, of the highest court in the state of Indiana. The state court opinion was rendered on September 5, 1984, and a timely petition for rehearing was denied on October 22, 1984. The Court has jurisdiction to review the judgment of the Indiana Supreme Court by writ of certiorari under the provisions of 28 U.S.C. §1257(3). The petition is timely filed under the provisions of Rule 20.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment V.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, §1.

STATEMENT OF THE CASE

On January 17, 1982, Arthur Jordan was working as a taxi cab driver. In the early morning hours of that day he was robbed and stabbed.

In the course of the police investigation of the robbery and stabbing of Arthur Jordan Respondent, a juvenile, became a suspect. Respondent and his parents were requested to appear at the police station for questioning. When Respondent and his parents arrived at the police station Respondent was placed under arrest by Detective Trathen. Respondent was advised of his rights and permitted to consult alone with his parents.

Detective Trathen began a tape recorded interview of Respondent, again advising Respondent and his parents of Respondent's rights, and Respondent requested an attorney. Detective Trathen then turned off the tape recorder.

Detective Trathen then explained to Respondent and his parents that he could not continue with the interrogation and that if Respondent wanted to talk further or make it right with him he (Respondent) would have to contact the detective. At this time Respondent blurted out that he did it but did not cut the victim.[1].

[1] The relevant portion of the testimony of Detective Trathen at the motion to suppress hearing regarding what he told Respondent and what Respondent stated is set forth in Appendix C.

Detective Trathen then inquired of his fellow detectives of the propriety of resuming questioning of Respondent. Thereafter Detective Trathen returned to Respondent and his parents and proceeded to take an unrecorded statement from Respondent. A second tape recorded statement was then taken, in which Respondent was again advised of his rights, and Respondent confessed in this statement.

Prior to trial Respondent filed a Motion to Suppress. In his Motion to Suppress Respondent sought to exclude from evidence his statement to the police on the ground that it was taken in violation of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The trial court, following a hearing on the motion, denied the motion to suppress.

At Respondent's trial, when Detective Trathen testified as to Respondent's statement, counsel for Respondent registered an objection to the testimony based upon the grounds argued in the pretrial motion to suppress.

Following his conviction and sentence Respondent, in his Motion to Correct Errors, again argued that his statement should have been suppressed. In his appeal to the Indiana Supreme Court Respondent, once more, argued that his statement was involuntary and that he should not have been interrogated after he requested an attorney.

In its opinion of September 5, 1984, the Indiana Supreme Court reversed Respondent's conviction. In its opinion the Indiana Supreme Court held that Detective Trathen interrogated Respondent after he had requested an attorney.

In its Petition for Rehearing, the State of Indiana argued that Detective Trathen did not initiate further interrogation of Respondent after the request for an attorney was

made by Respondent. The Indiana Supreme Court denied the State's Petition for Rehearing.

SUMMARY OF REASONS FOR ALLOWANCE OF THE WRIT

The Indiana Supreme Court incorrectly decided an important federal question which has not been settled by the Court. The Indiana Supreme Court incorrectly held that explaining to an in-custody defendant, who has invoked the right to counsel, that further questioning cannot be had unless the defendant initiates such questioning constitutes interrogation in violation of the proscription of *Edwards v. Arizona*. Petitioner contends that the mere advisement of the right to be free of further questioning does not constitute interrogation.

REASONS FOR ALLOWANCE OF THE WRIT

It is axiomatic that an accused enjoys the right against self-incrimination and the right to counsel. *United States Constitution*, Amendments V and XIV. Flowing from these rights is the now settled proposition that when a person is subject to custodial *interrogation* and requests an attorney any further discussion of the case is permitted only if the accused initiates further contact and discussion. *Edwards v. Arizona*, 451 U.S. 477 (1981), U.S. *reh. den.* 101 S.Ct. 3128. In addition, not only must the accused initiate the subsequent discussion, but the accused must also voluntarily, intelligently, and knowingly waive his constitutional rights. *Oregon v. Bradshaw*, ___ U.S. ___, 103 S.Ct. 2830, 2834-2835 (1983).

In the case at bar, it is not disputed that Respondent requested an attorney when first advised of his rights and questioned by Detective Trathen. What is in dispute is whether the statements made by Detective Trathen after Respondent requested an attorney, that further questioning or discussion of the case could not continue and that if

Respondent desired to discuss the case he would have to contact the detective, constituted "interrogation" within the proscription of the *Edwards* decision. The precise question presented in this Petition has not previously been addressed by the Court.

In order to determine the issue presented in this Petition for Writ of Certiorari it is necessary to examine the definition of "custodial interrogation." The term was defined by the Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980), wherein the Court held:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. (emphasis original)

at U.S. 300-302.

Petitioner asserts that Detective Trathen did not *expressly* question Respondent after the request for an

attorney was made (See Appendix C). The question presented by this Petition therefore becomes: Whether Respondent was subjected to the functional equivalent of interrogation? Petitioner asserts that the answer is no.

Petitioner submits that Detective Trathen, in effect, merely explained to Respondent the procedures ennuciated in *Edwards* for questioning of a suspect after an assertion of the right to counsel has been made. Detective Trathen's statements to Respondent (See Appendix C) were not such as "*...should have been known* were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis, supra,* at U.S. 302 (emphasis original).

Counsel for Petitioner has been unable to find any case in which a conversation between the police and the suspect in which the police have explained they cannot talk further with the accused and that any further discussion of the case will have to be initiated by the accused, such as occurred in the case at bar, has been discussed by the Court. However, it is clear that not every conversation with an in-custody defendant, following a request for an attorney, constitutes "interrogation."

It has been held that the questioning of a defendant in the context of routine booking procedures, with respect to normal biographical data of the defendant, does not normally constitute interrogation for such questioning is not intended to elicit an incriminating response. *United States v. Avery,* 717 F.2d 1020, 1024-1025 (6th Cir. 1983), U.S. *cert. den.* 104 S.Ct. 1683, U.S. *reh. den.* 104 S.Ct. 2377; *United States v. Morrow,* 731 F.2d 233, 237 (4th Cir. 1984), U.S. *cert. den.* 104 S.Ct. 2689.

Similarly, a statement by police to an accused that he should consider cooperating with the authorities has been held not to be interrogation for it was not designed to elicit an incriminating response. *United States v. Guido,* 704 F.2d, 675 (2nd Cir. 1983).

Petitioner submits that the same rationale applies in the

case at bar. Detective Trathen merely advised Respondent of his right under *Edwards* not to be further questioned unless he (Respondent) desired further discussion of the case. Certainly the mere advisement of the right not to be further questioned cannot be held to have been designed to elicit an incriminating response. Indeed, in a case involving the advisement of the *Miranda* rights it has been held that incriminating statements made by an accused while being advised of his rights were spontaneous utterances and that the authorities had no reason to believe that the advisement of rights would elicit an incriminating response from the defendant. *United States v. DeLaLuz Gallegos*, 738 F.2d 378, 380-381 (10th Cir. 1984).

It is therefore Petitioner's position that Detective Trathen's statements to Respondent after the request for an attorney, regarding the fact that he could not further question Respondent, were not interrogation. Detective Trathen's statements clearly were not an attempt to badger Respondent, which is the evil that *Edwards* sought to curb. *See Oregon v. Bradshaw, supra*, 103 S.Ct. 2834. Nor, was it a sophisticated, subtle method of eliciting incriminating evidence. *See United States v. Thoma*, 726 F.2d 1191, 1195-1196 (7th Cir. 1984), U.S. *cert. den.* 104 S.Ct. 2683.

The Indiana Supreme Court opinion holding that Detective Trathen's statements to Petitioner were interrogation is in error.

With respect to Respondent's statement to Detective Trathen, it is Petitioner's position that Respondent's statement following the advisement that further questioning would have to be initiated by Respondent was a spontaneous utterance. As a spontaneous utterance the statement was not in violation of Respondent's rights. *Avery, supra*, 1025; *DeLaLuz Gallegos, supra*, 381.

Petitioner further asserts that Respondent's spontaneous utterance of guilt was sufficient to initiate further interrogation following the request for an attorney. Indeed, in

United States v. Kroesser, 731 F.2d 1509 (11th Cir. 1984), an expression of regret at having involved another in the criminal activity was sufficient to constitute an initiation of further interrogation. Moreover, in *Oregon v. Bradshaw, supra*, the defendant's inquiry of what was then going to happen to him was held sufficient to permit further interrogation.

The only remaining question, then, is whether Respondent's subsequent tape recorded statement was given following a valid waiver of rights. Petitioner maintains that the answer to this question is clearly affirmative.

Whether there has been a valid waiver of rights requires an examination of the totality of the circumstances. *Edwards v. Arizona, supra; Oregon v. Bradshaw, supra.*

In the case at bar, Respondent, when first questioned, was fully advised of his rights and was permitted to consult, alone, with his parents. Respondent then requested an attorney but when Detective Trathen advised Respondent that there could then be no further questioning unless Respondent initiated the questioning, Respondent made a spontaneous utterance of guilt. Respondent's utterance was sufficient to initiate further discussion of the case, although Detective Trathen sought the advise of other officers regarding the propriety of further questioning. Although Respondent was not asked to sign a separate rights waiver, he was advised of his rights again before the second tape recorded interview. Respondent then readily confessed to his involvement in the crime.

Petitioner submits that Respondent's rights were scrupulously observed and that the above facts demonstrate that Respondent's confession was given only after a valid waiver of rights by Respondent. *See Oregon v. Bradshaw, supra; Wyrick v. Fields*, 459 U.S. 42 (1982); *Kroesser, supra.*

CONCLUSION

For the foregoing reasons, the Petitioner, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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By: William E. Daily
Deputy Attorney General

By: Michael Gene Worden
Deputy Attorney General

Attorneys for Petitioner

APPENDIX

APPENDIX A

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IN THE

SUPREME COURT OF INDIANA

JOHN H. MOORE, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	NO. 1182 S 433
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM MARION SUPERIOR COURT, CRIMINAL DIVISION VI
Honorable Thomas E. Alsip, Judge

DEBRULER, Jr. —.

This is a direct appeal from a conviction for robbery, a class A felony, Ind. Code §35-42-5-1. The case was tried before a jury. Appellant was a sixteen-year-old juvenile

who was tried as an adult. Appellant was sentenced to a term of twenty-two years.

The issue dealt with in this appeal is whether appellant's assertion of his right to counsel and the subsequent police-initiated interrogation in the absence of counsel rendered his confession and second taped statement inadmissible.

The facts pertinent to the appeal show that on January 16, 1982, Arthur Jordan was working part-time for Metro Taxicab Company. At 2:30 a.m. on January 17, 1982, he responded to a call to pick up a passenger at 1954 North LaSalle Street. Two men came out of the house and got into the cab. Mr. Jordan started driving toward the 2300 block of Winthrop. When Mr. Jordan arrived at the 2300 Block of Alvord Street, one of the passengers told him to stop the cab. Both men pulled knives on him, took two hundred dollars, kicked him out of the car and drove away.

An investigation of the incident commenced, and it was determined that appellant and Arthur Ausley were the two men that emerged from 1954 North LaSalle Street and entered the cab on the night in question. Appellant's parents were telephoned and were asked to bring their son down to the police station for questioning. On January 18, 1982, at about 5:30 p.m., appellant and his parents arrived at the police station.

After appellant had been processed through the juvenile branch Detective Trathen placed him and his parents in an interrogation room. Detective Trathen read appellant his rights, and before finishing the reading Trathen stopped and advised Moore he was under arrest for robbery. Detective Trathen then left the room for twenty minutes so that appellant could confer with his parents. Afterwards, Detective Trathen returned and finished reading the waiver of rights form. Appellant and his parents signed a police department waiver acknowledging that Detective Trathen had advised appellant of his right to stop questioning at any time if he decided to have an attorney.

Detective Trathen then attempted to take a recorded statement. He read appellant his rights again and asked him:

> "Q. Knowing all your rights, do you wish to give this statement at this time?
>
> A. If you have a lawyer, can you call him?
>
> Q. Do you want a lawyer now?
>
> A. I already have one.
>
> Q. Do you want a lawyer now?
>
> A. Yes."

At this point Detective Trathen explained to appellant and his parents that once appellant expressed his rights to have an attorney, he could no longer question him in regard to the investigation. Detective Trathen stated:

> "John, if you want to get this right, you're going to have to call me, because I can't come and see you. If you know this is serious business, and if you decide you want to talk to me, you're going to have to call."

Appellant then admitted:

> "Man, I want to get this right, we did it; but I didn't stick the man; Arthur did."

Detective Trathen left the room to consult with his superiors to the propriety of taping a second statement. Appellant was not asked to sign a separate rights waiver before the commencement of the second taping statement because Detective Trathen believed that the first rights waiver was sufficient. Detective Trathen then took the second taped statement. In the statement the appellant was advised of his rights and he waived them in this manner:

> "Q. Knowing all your rights, do you wish to give this statement at this time?
>
> A. Yes."

Appellant then gave a detailed statement of his involvement in the crime.

The Fifth and Fourteenth Amendments to the United States Constitution secure to each citizen the right to the presence and advice of counsel during custodial interrogation by the police. *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. A confession of guilt procured from a subject during custodial interrogation is not admissible in a trial of criminal charges in the absence of proof beyond a reasonable doubt that counsel was present or the right thereto was voluntarily and knowingly relinquished prior to the commencement of the interrogation. *Pirtle v. State*, (1975) 263 Ind. 16, 322 N.E.2d 634; *Oritz v. State*, (1976) 265 Ind. 549, 356 N.E.2d 1188. When the right of counsel is asserted during questioning that process must cease, and a confession procured by interrogators thereafter is per se inadmissible in the absence of a new waiver of counsel evidenced by proof that the suspect initiated the resumption of questioning. *Edwards v. Arizona*, (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378.

In this case, appellant answered in unambiguous terms that he wanted an attorney present during questioning. Detective Trathen recognized that this was an assertion of the right to counsel and turned off the tape recorder. At this point the interrogation should have ceased. Instead Detective Trathen initiated further conversation with his statement that began with "if you want to get it right, you're going to have to call me". This is a declarative statement that seeks a response. In this context it is the equivalent of "do you want to get it right", and that is how the appellant interpreted it when he said, "Man, I want to get it right, we did it." The conversation initiated by Detective Trathen was a resumption of the interrogation in violation of *Edwards v. Arizona, supra*, and as a result the subsequent confession and taped statement are inadmissible.

The conviction is reversed and the case is remanded for a new trial.

Givan, C.J., Hunter, Prentice and Pivarnik J.J., concur.

APPENDIX B

STATE OF INDIANA

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS
MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 232-1930

No. 11825433

John H.Moore ,Jr. V. State of Indiana

You are hereby notified that the Supreme Court

has on this day Appellee's petition for Rehearing is hereby DENIED, without Opinion. Givan,C.J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,

this 22 day of Oct, 19 84

Marjorie W. O'Laughlin
Clerk Supreme Court and Court of Appeals

A. This is in between the two statements. I advised the Defendant that since he expressed a desire to have an attorney, that I could no longer question him. I advised him at that point that if he wanted to discuss this with me at any other time, that it would be up to him to contact me, that I could not longer question him. I advised him, and his parents were present, that this was a very serious matter, and if he wanted to get it right with me, that he should contact me. At that time he broke down stating, "I did it. I didn't cut the the man."

Q. When did you make this statement to him that you just related?

A. I explained, it was after taking the first statement.

Q. When after taking the first statement?

A. Immediately following the first statement.

(R. III, 318, ls.6-21).

Q. Now, after you asked the question, "Do you want a lawyer now?", and Mr. Moore gave the response, "Yes", the machine was turned off at that time, is that correct?

A. That's correct.

Q. Now, after he made that statement, uh, did you ask him any other questions in an effort to gain a statement as to what occurred?

A. No, sir, I did not. Interrogation ended.

(R.III, 339, ls.12-20).

Q. After the tape machine was turned off during your effort to obtain the first statement, you had a further conversation off tape with Mr. Moore, is that correct?

Q. That's correct.

Q. Now, in the course of that conversation, it was your

testimony earlier that Mr. Moore made a statement during that conversation to you regarding this incident.

A. He did.

Q. Could you explain when and under what circumstances in the course of that conversation that Mr. Moore's statement came about?

A. Immediately after I shut the machine off during the first statement, I advised Ar—, uh, John Moore and his parents that at this point, I could no longer conduct the interview. I could no longer interrogate him about this crime; that if any time he wanted to speak with me or if he wanted to get this right with me, that he would have to come to me. I could no longer go to him to ask questions. I advised him, uh, that, I gave them cards with my phone number. I told him that he should think about it and let me know. At this time, John Moore broke down and said, "Man, I want to get it right". He says, "I was with Art. He cut the dude. I took some of the money, but I had nothing to do with hurting that man".

Q. Did you ask Mr. Moore any question immediately before he made that statement?

A. No, I did not.

(R.III, 341, 1.7 - R.III, 342, 1.9).